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In the Supreme Court of the United States

OCTOBER TERM, 1977

MAURICE P. FOLEY COMPANY, INC., ET AL., PETITIONERS

v.

JAMES BALDERSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-10a) is reported at 569 F. 2d 132. The opinion of the Benefits Review Board (Pet. App. 11a-19a) is reported at 4 B.R.B.S. 401. The decision and order of the administrative law judge (Pet. App. 20a-32a) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1977. A petition for rehearing was denied on January 12, 1978. The petition for a writ of certiorari was filed on April 5, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the administrative law judge's determination that the respondent employee's disability was not "manifest" at the time he was hired.

STATEMENT

Respondent Balderson had worked as a steamfitter for almost 23 years when he was hired by petitioner Foley in June 1972. Prior to his employment with Foley, Balderson had been troubled by asthma and an obstructive pulmonary condition (Pet. App. 6a-7a), but his condition had not interfered significantly with his ability to perform his job (Pet. App. 14a). During the year Balderson worked for Foley, however, he was exposed to a variety of noxious fumes and dust. For that reason, his condition deteriorated rapidly, and by March 1973 Balderson had developed a severe pulmonary impairment that left him totally and permanently disabled (Pet. App. 7a, 12a).

After leaving his job, Balderson applied for workers' compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. (1970 ed. and Supp. V) 901 *et seq.*, which has been adopted as the statutory workers' compensation scheme for the District of Columbia, 36 D.C. Code 501. The sole issue before the administrative law judge was whether, under Section 8(f) of the Act, 33 U.S.C. (Supp. V) 908(f), petitioners should be relieved of the obligation to make further payments to Balderson. Under Section 8(f), as the courts have construed it, an employer is not obligated to pay benefits to a disabled employee for more than 104 weeks if the employee had "an existing permanent partial disability" that was "manifest" to the employer at the time the employee was

hired. *Duluth, Missabe & Iron Range Railway Co.* v. *United States Department of Labor*, 553 F. 2d 1144, 1151 (C.A. 8); *Atlantic & Gulf Stevedores, Inc.* v. *Director, Office of Workers' Compensation Programs*, 542 F. 2d 602, 609 (C.A. 3); *American Mutual Insurance Co.* v. *Jones*, 426 F. 2d 1263, 1267-1268 (C.A. D.C.).

The administrative law judge held Section 8(f) inapplicable because, he concluded, any pre-existing disability Balderson may have had was not "manifest" to Foley at the time Balderson was hired (Pet. App. 29a).[1] The Benefits Review Board affirmed, holding that even if Balderson's previous lung condition was properly termed a "disability," the record supported the finding that the disability was not manifest to Foley when Balderson was hired (Pet. App. 13a-14a).

The court of appeals affirmed the Board's ruling. Applying the settled principle that the determination whether a condition is "manifest" or "latent" turns on "what information the employer has available to him when the employee is hired," the court held that substantial evidence supported the Board's factual finding that "no circumstance existed which would render Balderson's condition manifest at the time of his hiring by Foley" (Pet. App. 9a-10a).

ARGUMENT

Petitioners contend (Pet. 16-22) that the court of appeals applied an incorrect legal standard in reviewing the Board's finding that Balderson's condition was "latent" rather than "manifest."

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[1]The administrative law judge also concluded that Section 8(f) was inapplicable because Balderson's condition did not constitute an economic disability and because his employment with Foley merely aggravated a condition arising out of his prior employment (Pet. App. 7a n. 3, 28a-30a). Those grounds were not relied upon by the Board or the court of appeals and are therefore not at issue here.

The test whether a condition is manifest is, as the courts have uniformly held, objective: regardless of what an employer actually knew regarding the employee's disability, a condition is deemed "manifest" if the condition was objectively apparent from the information available to the employer at the time the claimant was hired. See *Equitable Equipment Co.* v. *Hardy*, 558 F. 2d 1192, 1196-1199 (C.A. 5); *Duluth, Missabe & Iron Range Railway Co.* v. *United States Department of Labor*, *supra*, 553 F. 2d at 1151; *Atlantic & Gulf Stevedores, Inc.* v. *Director, Office of Workers' Compensation Programs*, *supra*, 542 F. 2d at 609; *Dillingham Corp.* v. *Massey*, 505 F. 2d 1126, 1128 (C.A. 9); *American Mutual Insurance Co.* v. *Jones*, *supra*, 426 F. 2d at 1267-1268. Contrary to petitioners' contention, the court of appeals followed this unbroken line of precedent and applied an objective test in this case. Citing several of these cases, the court correctly stated the test as turning on "what information the employer has available to him when the employee is hired" (Pet. App. 9a). Similarly, the court noted that nothing in Balderson's employment history was indicative of a pulmonary disability to a degree that the employer "should have known of the extent of Balderson's condition" (Pet. App. 10a). The court further observed that Foley was not aware of Balderson's condition (Pet. App. 10a), a point of obvious evidentiary significance in supporting the conclusion that Balderson's condition was not objectively manifest. But, as its opinion makes clear, the court did not rely on this factor alone in upholding the administrative law judge's finding that Balderson's disability was not manifest.[2]

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[2]Like the court of appeals, the Board similarly recognized that the proper test of "manifestness" is objective (Pet. App. 13a).

Petitioners further contend (Pet. 24-25) that the Fifth and Eighth Circuits have improperly rejected the objective test of "manifestness" as well. Again, there is no basis for this assertion. The cases cited by petitioner demonstrate that those courts have followed the well-settled "objective" test first set out in *American Mutual Insurance Co.* v. *Jones*, *supra*, 426 F. 2d at 1267-1268. See *Equitable Equipment Co.* v. *Hardy*, *supra*, 558 F. 2d at 1196-1199; *Duluth, Missabe & Iron Range Railway Co.* v. *United States Department of Labor*, *supra*, 553 F. 2d at 1151.

Finally, petitioners argue (Pet. 25-30) that the decision of the Benefits Review Board is not entitled to the customary deference of the "substantial evidence" test because the administrative law judge made an error of law in the alternative ground he gave for his decision. The administrative law judge concluded both that Balderson's condition was not "manifest" and that it was not a "disability" within the meaning of Section 8(f) because it was not disabling in an economic sense. Whatever the status of the second conclusion as a matter of law,[3] it had no effect on the first conclusion. The determination that a condition is latent rather than manifest is wholly independent of the determination whether the condition is a disability, as the Board's opinion demonstrates. The Board affirmed the finding that the condition was latent, without having to reach the question whether the condition was a "disability" within the meaning of the Act. The administrative law judge's conclusion that Balderson's

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[3]The courts that have considered the matter have held that "disability" is not limited to "economic disability." *C & P Telephone Co.* v. *Director, Office of Workers' Compensation Programs*, 564 F. 2d 503 (C.A. D.C.); *Equitable Equipment Co.* v. *Hardy*, *supra*, 558 F. 2d at 1198; *Atlantic & Gulf Stevedores, Inc.* v. *Director, Office of Workers' Compensation Programs*, *supra*.

condition was not a "disability" therefore had no effect on the determination of the court of appeals that there was substantial evidence in the record to support the Board's conclusion that Balderson's condition was not "manifest."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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